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## PETITION FOR RECONSIDERATION

### **Statement of Points and Authorities in Support of Legal Issues Raised in the Petition.**

This Statement is presented pursuant to the requirements of Section 769 of the State Water Resources Control Board Regulations. Most of what is presented here is also in the Petition and in the Issues List, Exhibit B, attached to my 01/12/2010 petition. Once again, having been up most of the night (see footnote 1 of the Petition for Reconsideration) I'm finding that this is not going to be as extensive as I would like.

1. The Angle Decree was adopted by the United States District Court, Northern District, Northern Division, California, on January 13, 1930. A copy of the Decree is in the Ap. 18115 file, Category 20 Volume 2, Transcripts and Exhibits, Folder 4A Item 6 Exhibit 12 . That is not the "Corrected Decree" of which there is only one copy, on file with the Eastern District Court. I have a precisely faithful transcription of that Corrected Decree on my web site at <http://www.mjbarkl.com/Decree.htm> , or, if preferred, a copy of the 01/13/1930 decree is at <http://www.mjbarkl.com/278-CD1.pdf> , being an exact copy of the one filed on CD-ROM by the United States of America for its 09/05/2008 motion, Doc #277 et seq.

2. The following 7 provisions of the decree (from my original protest) are crucial:

D. Remember the rule of law that a legal document such as the Angle Decree is interpreted most strictly against its draftsman (see discussion of who wrote the Decree under Fraud on the Court, paragraph II.N. below). Specific relevant language from the Decree includes, all under the heading "General Provisions" therein:

1. Para XV. p. 173: "...except as herein specifically provided no diversion of water from the natural flow of the stream into any ditch or canal for direct conveyance to the lands shall be permitted as against any of the parties herein except in such amount as shall be actually and reasonably necessary for the beneficial use for which the right of diversion is determined and established by this decree, to wit: shall be made only at such times as the water is needed upon their lands and only in such amounts as may be required under the provisions hereof for the number of acres then being irrigated;"

2. Para XV. p. 173: "...in such instance diversions may be made outside of the irrigation sea- [p. 174] son, provided that the amount diverted as against any of the parties hereto from the natural

flow for direct application to such lands during the calendar year shall not exceed the quantity in acre-feet per acre allowed to be thus diverted herein during an irrigation season under any particular right;"

3. Para XV. p. 174: "...that where amounts or rates of diversions or flows of water are limited in this decree to stated figures for each irrigation season, such limitations apply as well to the entire calendar year containing said irrigation season;"

4. Para XV. p. 175: "...when permitted by said Water Master, divert a larger head or flow into his ditch for short periods of time in lieu of the smaller flow allowed to him under his said right, providing always that such use shall not exceed for the irrigation season the amount in acre-feet herein specified and allowed to be diverted from the stream for his lands;"

5. Para XV. p. 175: "...any of the parties to whom rights to water have been decreed herein shall be entitled, in accord with applicable laws and legal principles to change point of diversion and the places, means, manner or purpose of the use of the waters to which they are so entitled or of any part thereof, so far as they may do so without injury to the rights of other parties as the same are defined herein."

6. Para XVII p. 177: "...each and all of the parties to whom rights to water are decreed herein (and the persons, estates interests and ownerships represented by such thereof as are sued in a representative capacity herein), their assigns and successors in interest, servants, agents, attorneys and all persons claiming by, through or under them and their successors, are hereby forever enjoined and restrained from asserting or claiming-- [p. 178] as against any of the parties herein, their assigns or successors, or their rights as decreed herein--any right, title or interest in or to the waters of the Stony Creek or its tributaries, or any thereof, except the rights specified, determined and allowed by this decree,

L7. Para. XVII, p. 178: "...and each and all thereof are hereby perpetually restrained and enjoined from diverting, taking or interfering in any way with the waters of the Stony Creek or its tributaries or any part thereof, so as in any manner to prevent or interfere with the diversion, use or enjoyment of said waters by the owners of prior or superior rights therein as defined and established by this decree;"

E. Reading the entire Decree and then focusing on these seven phrases from it, it is obvious that the Decree is both *in rem* and *in personam*, and its jurisdiction is in the general nature of a virus: once infected, fully infected - 1) parcels named in the Decree are covered by the Decree; 2) persons named in the Decree binds all property that named person owns in the watershed; 3) Becoming a successor or assign to a party named in the Decree binds all property in the watershed owned or possessed or controlled by that successor or assign. Thus the Decree grows in scope until it covers the entire watershed.

With these intersecting provisions, no one subject to the Decree may apply for or accept Stony Creek watershed surface flow water rights from the SWRCB. Period. Water Code Section 138 recognizes that in general rights, etc., are not to be granted to persons not allowed to receive them.

3. Government Code Section 11504 provides that an agency is to develop an issues list for a

public hearing. Assuming that is what staff was doing in its review of my protest leading up to its initial denial of 12/14/2009, I don't believe that using 11504 to exclude a protestant from a hearing or deny him the right to protest is a proper application of that statute.

4. Water Code Sections 1340 & 1341 contrasted with Section 1342 shows that applicants and protestants have an equivalent right to a formal hearing,. If the SWRCB is going to allow protests at all, protestants should be treated equivalently to applicants.

5. SWRCB legal staff asserts that Sections 1122 of the Water Code and 768 & 769 of the SWRCB regulations provide for the appeal of a letter denying the right to protest. A comparison of the code sections with the 12/14/2009 letter shows that letter not complying with the description within the code and that it was not delivered correctly. I presented the petition 01/12/2010 anyway, but if the letter and codes are in alignment, they align through an underground regulation as defined by the State Office of Administrative Law at their regulations in Title 1 Sections 250 - 280. Such underground regulations are prohibited by Government Code Section 11340.5.

6. SWRCB Regulation Section 843 governs protests of extensions. I have not found any statutory basis for it.

7. Case law does not seem to help with protests and internal appeals. It appears that the only case discussing protests is *Temescal Water Co. v. Dept. of Public Works*, 44 C.2d 90, 1955, and its discussion may be dicta. This may be new ground.

8. While CEQA speaks of projects, NEPA speaks of plans or proposals and thus a proposal like this extension is covered. For instance,

42 USC 4332(2)(c) "...all agencies of the federal government must, to the fullest extent possible, 'include in every recommendation or report on proposals for legislation and other major Federal actions significantly affect the quality of the human environment, a detailed statement'"

and

"A proposal exists when a federal agency is actively proposing one or more alternative means of accomplishing a goal. A proposal may exist even when a federal agency has not formally declared that one exists." 40 cfr 1508.2

quoted in The NEPA Book, A step-by-step guide on how to comply with the National Environmental Policy Act, Ronald E. Bass, Albert I. Herson, Kenneth M. Bogdana, Solano Press, 2001 (2nd Ed)

9. in the Ap. 18115 files a 03/11/1994 letter, Sackett/Reclamation to Anton/SWRCB re: Baiocchi protest, USA 1) disagrees that Stony Creek is winter-run chinook salmon habitat, GCID

dam in the way; 2) & 3) agree, but covered by a "categorical exclusion checklist (CEC)" and a Section 404 nationwide Permit 23 to 02/18/1995 . . . . I have not found Section 404. Was it repealed? and the only way they could come up with a categorical exclusion was to seriously misrepresent the cumulative effects.

Respectfully Submitted

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